Office - Supreme Court
FILED
MAY 23 195
HAROLD B. WILLEY,

IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

No.... [redacted] 101

SOC. ARMADORA DEL NORTE, a corporation, Claimant of the Steamship THEOGENNITOR, etc., *Petitioner,*

vs.

ARNE ARMUS LAHDE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES B. HOWARD
LANE SUMMERS
Proctors for Petitioner
840 Central Building
Seattle 4, Washington

THE ARGUS PRESS, SEATTLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No.....

SOC. ARMADORA DEL NORTE, a corporation, Claimant of the Steamship THEOGENNITOR, etc., *Petitioner,*

vs.

ARNE ARMUS LAHDE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES B. HOWARD
LANE SUMMERS
Proctors for Petitioner
840 Central Building
Seattle 4, Washington

THE ARGUS PRESS, SEATTLE

INDEX

	Page
Citation to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
Reasons for Granting the Writ	4
A. Conflict of Decisions	4
B. Important Unsettled Question	8
C. Decision Against Weight of Authority	10
Conclusion	12

TABLE OF CASES

Adamowski v. Gulf Oil Corp. (C.A. 3) 197 F.(2d) 523 (per curiam) aff'g. (E.D.Pa.) 93 F.Supp. 115 ..... 4, 6, 7

Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 814, 99 L.Ed. (Adv.) 296 11

Brady v. Roosevelt S.S. Co., 317 U.S. 575 11

Cookingham v. U. S. (C.A. 3) 184 F.(2d) 213, cert. den. 340 U.S. 935 ..... 4, 6

Daniels v. Pacific Atlantic S.S. Co. (D.Md.) 120 F. Supp. 96 6

Dixon v. U. S. (C.A. 2) 219 F.(2d) 10 9

Hanrahan v. Pacific Transport Co., Ltd. (C.A. 2) 262 Fed. 951, cert. den. 252 U.S. 579 ..... 4, 5, 6

Hawn v. Pope & Talbot, Inc., 346 U.S. 406 ..... 9, 10, 12

International Stevedoring Co. v. Haverty, 272 U.S. 50 8

Lahde v. Soc. Armadora Del Norte, 107 F.Supp. 664, 1952 A.M.C. 930, 1953 A.M.C. 514, 220 F.(2d) 357, 1955 A.M.C. 828 1

Mahnich v. Southern S.S. Co., 321 U.S. 96 7

Max Morris, The, 137 U.S. 1 12

McMahan v. S.S. Panamolga (D.Md.) 127 F.Supp. 659 5

Osceola, The, 189 U.S. 158 ..... 8, 10

Petroline, The (C.A. 2) 271 Fed. 273 ..... 4, 6

Page

Plamals v. Pinar del Rio, 277 U.S. 151 8
Pope & Talbot v. Hawn, 346 U.S. 406 ..... 9, 10, 12
Santa Barbara, The (C.A. 2) 263 Fed. 369 ..... 4, 6
Seas Shipping Co. v. Sieracki, 328 U.S. 85 8
Warner v. Goltra, 293 U.S. 155 9

STATUTES

28 U.S.C., §1254(1) 2
28 U.S.C., §1333(1) 2

IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

SOC. ARMADORA DEL NORTE, a corporation, Claimant of the Steamship THEOGENNITOR, etc., *Petitioner.*

vs.

ARNE ARMUS LAHDE, *Respondent.*

No.....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Soc. Armadora Del Norte, a corporation, prays that a writ of certiorari issue to review the judgment and decree of the Court of Appeals for the Ninth Circuit in the above entitled Admiralty Cause, as entered and filed on March 16, 1955.

CITATIONS TO OPINIONS BELOW

The District Court for the Western District of Washington held with petitioner, first on oral opinion by Judge McLaughlin (R. 46) and later on written opinion by Judge Fee (R. 55), reported in 107 F.Supp. 664, 1952 A.M.C. 930 and 1953 A.M.C. 514. The opinion of the Court of Appeals for the Ninth Circuit (R. 107) is reported in 220 F.(2d) 357; 1955 A.M.C. 828.

JURISDICTION

The District Court entered its decree of dismissal October 29, 1953. (R. 77) The Court of Appeals for the Ninth Circuit entered its decree of reversal on March 16, 1955. (R. 114)

The jurisdiction of this Court is invoked under Title 28 U.S. Code §1254(1). The jurisdiction of the District Court was based upon Title 28 U.S. Code §1333(1).

QUESTIONS PRESENTED

1. Whether an injured longshoreman employed by a stevedore contractor can recover indemnity from a vessel by a libel *in rem* charging only negligence and not unseaworthiness.

2. Whether the allegations in the second amended libel (R. 30, 35) charged real unseaworthiness or mere negligence.

STATEMENT OF THE CASE

A libel *in rem* (only) was filed by respondent against the steamship THEOGENNITOR on April 23, 1951, seeking recovery of damages for injuries allegedly sustained while working as a longshoreman aboard the vessel, in the employ of a stevedore contractor. (R. 3) Petitioner appeared and defended only as owner and claimant of the vessel, released on bond in an agreed amount. (R. 14)

Before trial in the District Court respondent amended his libel *in rem* by enlarging the allegations of negligence. (R. 20) However, neither the original libel *in rem* nor the first amended libel *in rem* contained the

word "unseaworthiness", making no pretense of charges other than "negligence".

Initially Judge McLaughlin granted petitioner's motion to dismiss the libel *in rem* at the close of respondent's evidence on the ground that respondent had neither alleged nor proved unseaworthiness, which the court held to be necessary upon a libel *in rem* claiming a maritime lien. (R. 46)

Thereafter, with leave of court, respondent filed a second amended libel *in rem,* which contained general allegations that the injuries were due to the "unseaworthy condition to the vessel" and to "the negligence of the master and crew", followed by fourteen specific charges of alleged fault. (R. 34, 35) Attacking these, petitioner filed exceptions on the ground that they did not constitute charges of real unseaworthiness as distinguished from mere negligence, the contention being that respondent could not recover *in rem* on charges of negligence alone. (R. 38)

Subsequently Judge Fee (now on the Court of Appeals) after extended oral arguments and full written briefs, again sustained petitioner's contentions by opinion filed January 7, 1952 (R. 55) upon which final decree of dismissal was entered. (R. 77) Respondent's appeal resulted in a reversal (R. 107), inducing this petition.

Before appeal respondent never attempted recovery against petitioner itself by an amended libel *in personam* praying foreign attachment to obtain equivalent security, as twice suggested by the trial court. (R. 46, 55, 60)

This litigation seeks to test and settle the nature and scope of an injured longshoreman's right or remedy under the general maritime law to a maritime lien by a libel *in rem*.

REASONS FOR GRANTING THE WRIT

A. Conflict of Decisions

There is a definite conflict between the instant decision and several decisions of the Courts of Appeals for the Second and Third Circuits on the important question of whether an allegation of failure to use adequate appliances available aboard a vessel constitutes a charge of true unseaworthiness or of mere negligence.

Hanrahan v. Pacific Transport Co., Ltd. (C.A. 2) 262 Fed. 951, cert. den. (1919), 252 U.S. 579;

The Santa Barbara (C.A. 2) 263 Fed. 369 (*in rem*);

The Petroline (C.A. 2) 271 Fed. 273 (*in rem*);

Cookingham v. U.S. (C.A. 3) 184 F.(2d) 213, cert. den. 340 U.S. 935;

Adamowski v. Gulf Oil Corp. (C.A. 3) 197 F. (2d) 523, (*per curiam*) aff'g. 93 F.Supp. 115.

In *Hanrahan v. Pacific Transport Co., Ltd.*, 262 Fed. 951, the Court of Appeals for the Second Circuit when affirming a directed verdict in the trial court for the vessel owner, held in opinion by Judge Hough that a seaman injured by falling overboard had not proved unseaworthiness (as distinguished from negligence) by showing a failure of the vessel's officers to have in-

stalled on deck an available handrail supported by removable stanchions, the court saying:

> "(2) Every allegation of fact made by plaintiff has been assumed, yet we hold that no jury could on such facts declare the ship unseaworthy.
>
> "Seaworthiness is a relative term; a vessel may have that quality in port, and yet be wholly unfit for rough water (*McLanahan v. Universal, etc., Co.*, 1 Pet. 170, 7 L.ed. 98); and to say that this ship was unseaworthy because she had no handrail up, while lying alongside a wharf discharging cargo, is merely untrue." (Emphasis supplied)

Hanrahan v. Pacific Transport Co., Ltd., 262 Fed. 951, 952.

The material facts involved in the *Hanrahan* case and alleged in the present case are essentially the same. In each the injured person fell from the deck of a vessel during conditions of darkness, the charge of fault being the absence of a handrail or safety guard. (R. 34, 35) Although the *Hanrahan* case was an action at law and the present case is an admiralty suit *in rem,* these procedural differences are unrelated to the substantive distinction between unseaworthiness and negligence.

The conflict created by the decision of the Ninth Circuit in the present case with the decision of the Second Circuit in the *Hanrahan* case is not only clear but also current. Adhering to the established distinction between true unseaworthiness and mere negligence as declared by Judge Hough in the older case, his opinion has been very recently cited with approval in *McMahan v. S.S. Panamolga* (D. Md.) 127 F.Supp. 659, and

Daniels v. Pacific Atlantic S.S. Co. (E.D.N.Y.) 120 F. Supp. 96, 99.

In *The Santa Barbara* (C.A. 2) 263 Fed. 369, again the Second Circuit held that failure to keep in position on board a vessel an available chain to support its smokestack was but negligence, for which the crew member could not recover by a libel *in rem,* the court saying:

> "* * * it was at most no more than his (master's) personal negligence in handling or mishandling good and proper appliances duly furnished by the owners. As nothing was defective in fit or material, and everything suggested as proper even by libelant's proctor, was provided for the ship, we hold that no unseaworthiness was shown." (Emphasis supplied)
>
> *The Santa Barbara* (C.A. 2) 263 Fed. 369, 370.

In *The Petroline* (C.A. 2) 271 Fed. 273, a crew member sought recovery *in rem* upon allegations of an unsuitable block used to prop open a ventilator cover. Affirming a decree for the shipowner, the Second Circuit followed its earlier decision in the *Hanrahan* case, holding that since the vessel had provided other blocks both available and adequate it was not "unseaworthy".

Harmonizing with these earlier Second Circuit decisions the Court of Appeals for the Third Circuit declined to extend the doctrine of unseaworthiness to an inherently sound vessel, which was temporarily rendered unsafe by a transitory condition on board, in the case of *Cookingham v. U.S.* (C.A. 3) 184 F.(2d) 213, cert. den. 340 U.S. 935.

In *Adamowski v. Gulf Oil Corp.* (C.A. 3) 197 F.(2d)

523, the Third Circuit was consistent with its former ruling when it affirmed a trial court's conclusions by wholly approving its reasons for disallowing damages to a crew member charging unseaworthiness because of an oily deck and a dark passageway. The trial court's opinion thus expressly adopted said:

> "The passageway in which the plaintiff slipped was perfectly sound. Its unsafe condition was the result of the temporary presence of a foreign substance upon it, or the result of a temporary absence of light in it." (Emphasis supplied)
>
> *Adamowski v. Gulf Oil Corp.* (E.D.Pa.) 93 F.Supp. 115, 117.

The allegations of the second amended libel (R. 30, 35) as to the failure to light or guard or otherwise "employ existing appliances" to protect the area, which the Ninth Circuit characterized as a "dangerous condition" (R. 108), are exactly the same type of defects which both the Second Circuit and the Third Circuit have repeatedly held would not constitute unseaworthiness.

As related to the clear, continuing conflict between the decision of the Ninth Circuit in the present case which invades the integrity of established general maritime law, and the decisions of the Second and Third Circuits in the cases reviewed, which apply its principles, we submit that their precedents should be supported by this Court for reasons of certainty and stability as recited in the dissenting opinion of Mr. Justice Roberts, with which Mr. Justice Frankfurter joined in *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 105.

B. Important Unsettled Question

An important undetermined question of maritime law is presented which should be resolved by this Court. The question: Can a longshoreman, charging mere negligence alone, enforce a maritime lien by suit *in rem* although the same remedy is unavailable to a crew member?

Stated otherwise, this Court having classed both longshoremen and crew members as "seamen" by its decisions in *International Stevedoring Co. v. Haverty,* 272 U.S. 50, and *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, will this Court countenance within that category inequitable inequality of relief *in rem* by allowing to longshoremen a remedy denied to crew members, who are the traditional wards of the admiralty courts? *Plamals v. Pinar del Rio,* 277 U.S. 151, 155-157; *The Osceola,* 189 U.S. 158, 176.

Complicating confusion as to the rights and remedies of longshoremen for damages has developed since the decision in 1946 by this Court in *Seas Shipping Co. v. Sieracki, supra,* which first introduced into the general maritime law the doctrine that a longshoreman employed by a stevedore contractor, being entitled to the "traditional securities" of a "seaman", is entitled to an absolute warranty of seaworthiness, supporting recovery *in personam* without actual fault or actual negligence by the vessel owner.

When commenting upon the uncertain future significance of this far-reaching innovation created by the decision of this Court in *Sieracki,* Mr. Justice Frank-

furter in his concurring opinion in *Pope & Talbot, Inc., v. Hawn,* said:

> "That decision inevitably raises doubts whether longshoremen are still entitled to recover against a shipowner for negligence, except insofar as a state right of action for negligence, to which the state rule on contributory negligence would be applicable, is enforceable. Cf. The Hamilton, 207 U.S. 398, 52 L.ed. 264, 28 S.Ct. 133. For The Osceola, in recognizing crew members' right of action for unseaworthiness, also held that they had no such right against the shipowner for negligence. Did Sieracki, in holding that longshoremen laboring like seamen of old in the 'service of the ship' were entitled to recover for unseaworthiness, leave them also with the negligence cause of action which The Osceola denied to seamen?"
>
> *Pope & Talbot, Inc., v. Hawn,* 346 U.S. 406, 416.

The precipitate of precedent having been disturbed, now steamship operators, waterfront workers, stevedore companies and insurance interests are anxious for early reconciliation by this Court in a decision definitely determining whether longshoremen charging negligence only against a vessel *in rem* are to be given a greater remedy than members of its crew, who alone were formerly a "favored class" accorded special protection as wards of the admiralty courts. *Warner v. Goltra,* 293 U.S. 155, 162. The expediency for such clarification on complex questions now presented under the doctrines of unseaworthiness and negligence was recognized by remarks of Mr. Justice Harlan in his very recent opinion for the Second Circuit in *Dixon v. U.S.,* 219 F.(2d) 10, 15.

Upon this aspect of the petition it is the essence of petitioner's contention that if longshoremen are to remain within the category of "seamen" then they should be treated as such when suing a vessel *in rem* to enforce a maritime lien for damages—in other words, if accorded the benefit of the seamen's right it should be accompanied by the limitation of the seamen's remedy.

For almost half a century that particular limitation has been accepted as axiomatic since declared in *The Osceola,* 189 U.S. 158, where in 1902 this Court said that the vessel and the owner are liable to indemnify the "seamen" for injuries received in consequence of "unseaworthiness" but

> "That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, * * * " (Emphasis supplied)
>
> *The Osceola,* 189 U.S. 158, 175.

C. Decision Against Weight of Authority

The erroneous decision of the Court of Appeals for the Ninth Circuit conflicts with the weight of authority and misapplies recent decisions of this Court.

The ruling of the Ninth Circuit was largely rested on *Pope & Talbot, Inc., v. Hawn,* 346 U.S. 406, which was wholly unrelated to remedy, the real issue here. That was a civil action at law seeking merely a judgment *in personam.* The pending proceeding is solely an admiralty suit *in rem* to enforce a maritime lien. The two cases in the matter of remedy stand in complete contrast. Obviously the Ninth Circuit misapplied the *Hawn* case in deciding the present case, which essentially involves the single question of the exact basis

upon which a longshoreman can obtain recovery, not from the vessel owner *in personam,* but from the vessel itself *in rem.*

The Ninth Circuit also relied upon the recent decision of this Court in *Boudoin v. Lykes Bros. Steamship Company, Inc.,* 348 U.S. 814. That again was a law action *in personam,* not an admiralty suit *in rem,* so that it is likewise distinguishable. Furthermore, that case and the present case are dissimilar in that in *Boudoin* unseaworthiness was found because of an inherent defect in a seaman—his "proclivity for assaulting people", while here unseaworthiness is claimed not because of any defect in either vessel or its appliances as existing when supplied by the shipowner, but only in condition as created subsequently by the alleged failure of the crew to use available sound appliances of the vessel. (R. 34, 35) We submit that the ruling in *Boudoin* is inapposite here and that the decision of this Court was misapplied by the Ninth Circuit.

The opinion of the Ninth Circuit patently misinterpreted this Court's decision in *Brady v. Roosevelt Steamship Company,* 317 U.S. 575. The opinion below asserts that "the widow recovered *in rem* for the death of her husband caused by negligence" (R. 111), when in truth this Court's opinion recites that the proceeding "was brought in the New York Supreme Court but was removed to the Federal District Court". *Brady v. Roosevelt Steamship Company,* 317 U.S. 575, 577. Therefore, that case could not have been an admiralty proceeding *in rem* and should not have been an unfavorable influence upon the appeal in this case.

In relying upon *The Max Morris,* 137 U.S. 1, to support the proposition that a longshoreman may recover *in rem* against a vessel for negligence without charging or proving unseaworthiness, the opinion of the Ninth Circuit was willing to assume more than the concurring opinion of Mr. Justice Frankfurter in *Pope & Talbot, Inc., v. Hawn,* supra, where he registered serious doubt that "negligence" alone was involved when "unseaworthiness" was indicated, it being merely undesignated as such in terminology. *Pope & Talbot, Inc., v. Hawn,* 346 U.S. 406, 416.

To summarize, a right reading of this Court's decisions upon which the Ninth Circuit relied in its opinion reflects simply unsound construction which should be quickly corrected to avoid continued confusion.

CONCLUSION

For reasons of clarity and certainty upon a critical question of general maritime law—important to all directly concerned in the employment of maritime workers and in operating ships — the writ of certiorari sought by this petition should be granted.

Respectfully submitted,

CHARLES B. HOWARD
LANE SUMMERS
Proctors for Petitioner
840 Central Building
Seattle 4, Washington

May 25, 1955

JUN 4 1955
HAROLD B. WILLEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1954

No. [redacted]

SOC. ARMADORA DEL NORTE, a corporation, Claimant of the Steamship THEOGENNITOR, etc., *Petitioner*,

vs.

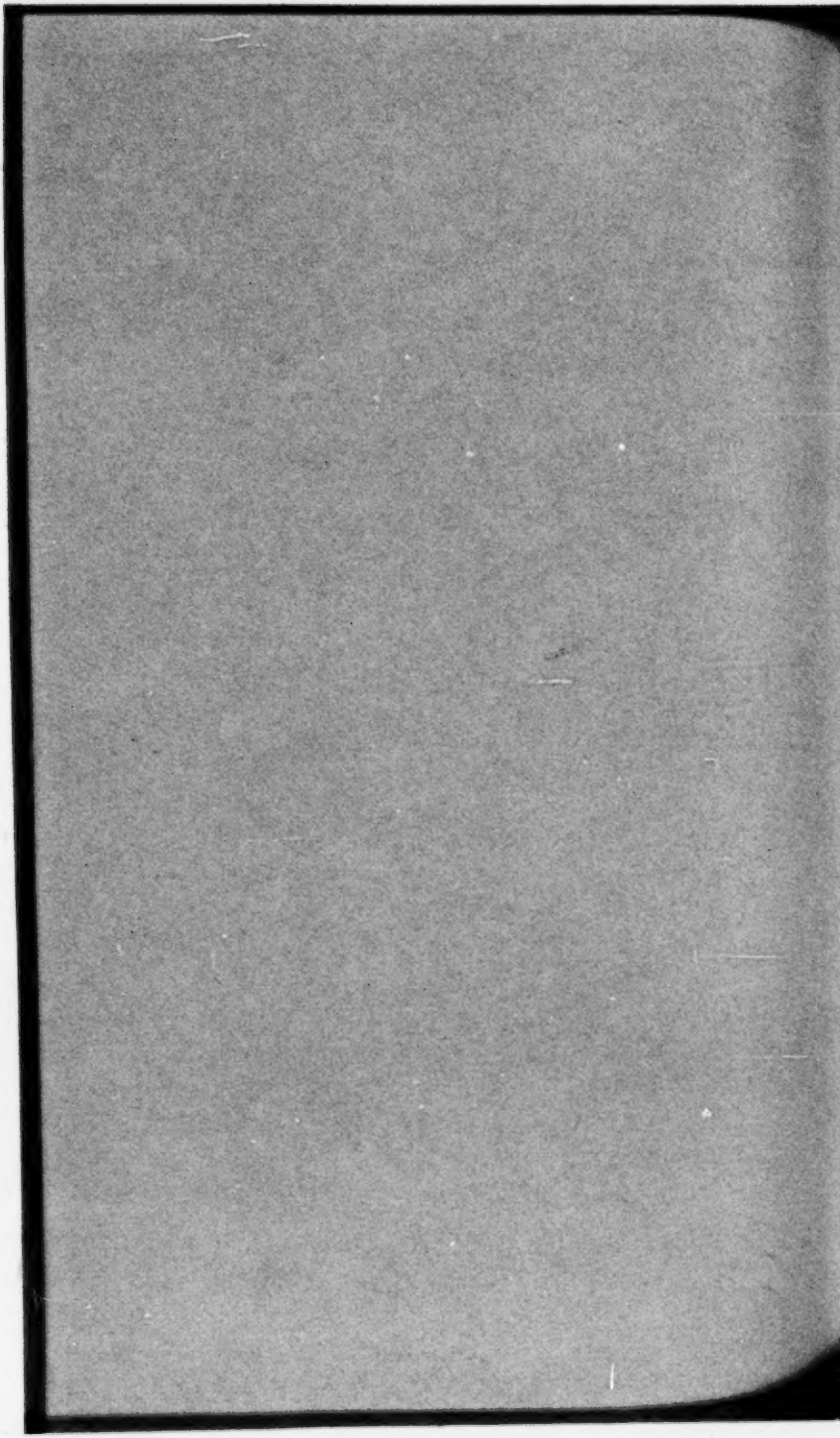
ARNE ARMUS LAHDE, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

CHARLES B. HOWARD
LANE SUMMERS
Proctors for Petitioner
840 Central Building
Seattle 4, Washington

THE ARGUS PRESS, SEATTLE



IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 821

SOC. ARMADORA DEL NORTE, a corporation, Claimant of the Steamship THEOGENNITOR, etc., *Petitioner,*

vs.

ARNE ARMUS LAHDE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

CHARLES B. HOWARD
LANE SUMMERS
Proctors for Petitioner
840 Central Building
Seattle 4, Washington

THE ARGUS PRESS, SEATTLE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARNE ARMUS LAHDE, *Appellant*, vs. SOC. ARMADORA DEL NORTE, a Corporation, Claimant of the Steamship Theogennitor, etc., *Appellee*.	No. 14,155 Mar. 16, 1955

Appeal from the United States District Court for the Western District of Washington, Southern Division

---

Before: DENMAN, Chief Judge, and ORR and POPE, Circuit Judges

DENMAN, Chief Judge

Lahde appeals from a decree of the District Court dismissing without a hearing on the merits his amended libel in rem against the steamship THEOGENNITOR in which he, a stevedore, sought damages for injuries arising from his falling into an open hatch in an illy lighted passageway leading to his place of work. The grounds of the dismissal are that the libel failed to allege a cause of action either based on unseaworthiness of the vessel or on negligence on the part of the officers and crew.

A. *The Libel Sufficiently States the Injuries Were Caused by the Vessel's Unseaworthiness.*

The libel alleges that the stevedore came on board the vessel as an invitee to remove a stringer of timber on the starboard side of the ship, the removal a part of stevedoring the ship. To reach the stringer he would pass from an open door on the portside of the ship, enter 'tween the deck space

and walk to an open door on the starboard side. The 'tween deck space was dimly lighted and nevertheless had an open hatch from which two hatchboards had been removed. This dangerous condition, the libel alleges, was known "to the owner, master and crew."

In this dimly lighted area the stevedore fell through the open hatch and was injured. The libel continues with the allegation, "Thirteenth: Said accident was caused, without any contributing fault or neglect on the part of the libelant, solely and proximately by the defective, unsafe, and *unseaworthy condition* of the vessel and its failure to provide proper and sufficient ways, works, means and appliances;" (Emphasis supplied.) The above allegations clearly state a cause of action for damages caused by the vessel's unseaworthiness. The parties agree that a libel in rem against the vessel may be maintained by the stevedore for injuries from such unseaworthiness.

However, under recent decisions of the Supreme Court, we think such a cause of action is stated even though the unseaworthy condition is unknown to the owner. Boudoin v. Lykes Bros. Steamship Co., Inc., No. 406, October Term, 1954, was decided February 28, 1955. There Boudoin, a seaman, recovered damages for a blow on the head from another seaman. The attacking seaman, on evidence of his conduct *after* his attack, was found to have a savage and vicious nature, so different from the ordinary seaman that his presence made the vessel unseaworthy and recovery was based on that ground. There is not the slightest evidence that the owner knew or could have known the vicious character of the attacking seaman when Boudoin was hit on the head and the cause of action arose. The district court held the vessel unseaworthy because of the attacking seaman's vicious nature and that "the warranty of seaworthiness is a kind of liability without fault in which knowledge of the circumstances creating the unseaworthiness is immaterial." Boudin v. Lykes Bros. S.S. Co., 112 F. Supp. 177, 180. The court of appeals

reversed, holding that the "shipowners" were not shown to have knowledge of the seaman's character.

The Supreme Court, in reversing the court of appeals and affirming the district court, stated:

> "We see no reason to draw a line between the ship and the gear on the one hand and the ship's personnel on the other. A seaman with a proclivity for assaulting people may, indeed, be a more deadly risk than a rope with a weak strand or a hull with a latent defect."

The failure to replace the gear of the two hatch boards on the open hatch in the dim light is certainly as dangerous an unseaworthiness as the vicious nature of a crew member. Here, as in the latter case, the vessel would be liable though the unseaworthiness is unknown to the owner.

So also in the recent case of Pope and Talbot v. Hawn, 346 U.S. 406. There Hawn, a carpenter invitee of the shipowner to be on the ship, as was stevedore Lahde here, was injured, as was Lahde, by falling into an open hatch. Hawn was held entitled to damages since the open hatch created unseaworthiness in the vessel. There is no mention in the opinion that the shipowner knew the hatch was open.

The case of Mahnich v. Southern S.S. Co., 321 U.S. 96, was not under the Jones Act but rested on general maritime law. The court, in holding Mahnich entitled to damages, stated:

> "Petitioner, a seaman on respondent's vessel, the 'Wichita Falls,' was injured, while at sea, by a fall from a staging, which gave way when a piece of defective rope supporting it parted. The rope was supplied by the mate when there was ample sound rope available for use in rigging the staging. The question is whether the defect in the staging was a breach of the warranty of seaworthiness rendering the owner liable to indemnify the seaman for his injury."
>
> * * *
>
> "In thus refusing to limit, by application of the fellow servant rule, the liability of the vessel and owner for unseaworthiness, this Court was but applying the familiar and then well established rule of *non-maritime torts*,

that the employer's duty to furnish the employee with safe appliances *and a safe place to work*, is nondelegable and not qualified by the fellow servant rule. * * * It would be an anomaly if the fellow-servant rule, discredited by the Jones Act as a defense in suits for negligence, were to be resuscitated and extended to suits founded on the warranty of seaworthiness, so as to lower the standard of the owner's duty to furnish safe appliances below that of the land employer.

"The staging from which petitioner fell was an appliance appurtenant to the ship. It was unseaworthy in the sense that it was inadequate for the purpose for which it was ordinarily used because of the defective rope with which it was rigged. Its inadequacy rendered it unseaworthy, whether the mate's failure to observe the defect was negligent or unavoidable. Had it been adequate, petitioner would not have been injured and his injury was the proximate and immediate consequence of the unseaworthiness. See The Osceola, supra, 174-175, and cases cited. Any negligence of the mate in selecting the rope and ordering its use as a part of the staging, or of the boatswain in using it for that purpose, could not relieve respondent of the duty to furnish a seaworthy staging. *Whether petitioner* [the owner] *knew of the defective condition of the rope does not appear, but in any case the seaman, in the performance of his duties, is not deemed to assume the risk of unseaworthy appliances.* The Arizona v. Anelich, supra, 123-124; Beadle v. Spencer, supra, 129-130; Socony-Vacuum Co. v. Smith, supra." (Emphasis supplied.)

The shipowner as much owed to its invitee stevedore as to a sailor the duty to furnish "the employee . . . a safe place to work" with "is nondelegable" as it is not in "non-maritime torts."

It is immaterial whether the shipowner, invitor of the stevedore on the ship, knew of the failure to place the ship's "appliances," here two hatch boards, on the open hatch dangerous in the defective lighting, since it owed the same "nondelegable" duty to furnish him a safe place to work as does a land employer.

B. ***A Stevedore May Recover in rem Against the Ship to Which the Owner Invites Him for the Negligence of its Crew Members.***

This court so held in The Joseph B. Thomas, 86 Fed. 658 (Cir. 9), where the stevedore working in the hold was injured by a keg falling through the hatch hold above him. A sailor negligently caused the keg to fall from a pile of hatch covers on which it rested. This case is followed by our decision in The Aymerich, 26 F. 2d 173 (Cir. 9), where we considered the merits of the contention that the charged negligence of crew members which injured a stevedore creates a right to libel in rem but upheld the finding of the lower court that there was no negligence. We held similarly in The Santa Cecilia, 22 F. 2d 251 (Cir. 9), *where recovery in rem* was denied because no negligence was shown.

Likewise in the Max Morris, 137 U.S. 1, the longshoreman recovered in rem for injuries resulting from the ship's officers' negligence. So also in Braby v. Roosevelt S.S. Co., 317 U.S. 531, where a widow recovered in rem for the death of her husband caused by negligence, he being an invitee on on the vessel. So also in The Helios, 12 Fed. 732 (D.C., S.D., N.Y.); Gerrity v. Bark Kate Conn, 2 Fed. 241 (D.C., E.D., N.Y.).

We have also held that the stevedore may recover in admiralty in personam for the negligence of the crew. Tidewater Associated Oil Co. v. Richardson, 169 F. 2d 802 (Cir. 9); Grays Harbor Stevedore Co. v. Fountain, 5 F. 2d. 385 (Cir. 9).

Appellant contends that all these cases are against the law as it is today. Now, it contends, the stevedore's status must be deemed identical with that of a seaman in his relationship with the owner and the vessel. It relies on International Stevedore Co. v. Haverty, 272 U.S. 50, involving the Act of June 5, 1920, 41 Stats. 988, 1007, giving seamen the same right to sue the employer as is given railway employees. In holding that a stevedore working on a vessel was entitled to the same right the court states:

> "It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen.' But words are flexible. The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew. Atlantic Transport Co. v. Imbrovek, 234 U.S. 52, 62. We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship. The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business. If they should be protected in the one case they should be in the other. In view of the broad field in which Congress has disapproved and changed the rule introduced into the common law within less than a century, we are of the opinion that a wider scope should be given to the words of the act, and that in this statute 'seamen' is to be taken to include stevedores employed in maritime work on navigable waters as the plaintiff was, whatever it might mean in laws of a different kind."

Ignoring the words "It is true that for most purposes, as the word is commonly used, stevedores are not seamen" appellee contends that stevedores for *all* purposes are seamen and, since it is unquestioned that seamen in the absence of statute cannot recover for negligence of fellow crew members, the stevedore cannot.

Appellee also relies on language in Seas Shipping Co. v. Sieracki, 328 U.S. 85, holding that for the "purpose" of the liability there claimed the stevedore's rights are the same as a seaman's, the court stating at page 99:

> " '* * * for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protection, regardless of the fact that he is employed immediately by another than the owner. *For these purposes* he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards.' Seas Shipping Co. v. Sieracki, 328 U.S. 85, 99." (Emphasis supplied.)

The "purpose" of the Sieracki case was the determination of the stevedore's right to recover in a civil action at law for an injury due to the vessel's unseaworthiness. As to this the holding is that the stevedore is identical with the seaman. From this, the reasoning of appellee again jumps to the conclusion that for *all purposes* the rights of the stevedore are the same as those of the seaman and since the seaman has no right to recover for the negligence of the officers and crew, either in rem or in personam, the stevedore has no such right.

The Supreme Court holds to the contrary in Pope and Talbot v. Hawn, 346 U.S. 406. That is a case at common law in which Hawn, aboard the ship as a carpenter employed by a firm engaged to repair it, sued the shipowner for injuries arising from the negligence of the shipowner. The Court held that the shipowner's liability was that of the admiralty law. It disposes of appellee's contention concerning the case of Seas Shipping Co. v. Sieracki, adversely to appellee, stating at page 413: "The fact that Sieracki upheld the right of workers like Hawn to recover for unseaworthiness does not justify an argument that the Court thereby blotted out their long-recognized right to recover in admiralty for negligence."

The "long-recognized right" of the stevedore is to recover both in personam and in rem for such negligence. We hold that our decision in the case of The Joseph B. Thomas states the law as it is today and that stevedore Lahde's libel properly alleges his claim that he is entitled to recover in rem from the steamship *Theogennitor* for his injuries arising from the negligence of members of its crew.

The decree is reversed.

(Endorsed:) Opinion. Filed Mar. 16, 1955.
Paul P. O'Brien, Clerk.

[Reported in 220 F.(2d) 357; 1955 A.M.C. 828.]

FILED
JUN 20 1955
HAROLD B. WILLEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1954

No. [redacted]101

SOC. ARMADORA DEL NORTE, a corporation, Claimant of the Steamship THEOGENNITOR, etc., *Petitioner*,

vs.

ARNE ARMUS LAHDE, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OSCAR A. ZABEL,
Proctor for Respondent,
518 Fourth & Pike Building,
Seattle 1, Washington.

PHILIP J. POTH,
Of Counsel.

THE ARGUS PRESS, SEATTLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 821

SOC. ARMADORA DEL NORTE, a corporation, Claimant of the Steamship THEOGENNITOR, etc., *Petitioner*,

vs.

ARNE ARMUS LAHDE, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OSCAR A. ZABEL,
Proctor for Respondent,
518 Fourth & Pike Building,
Seattle 1, Washington.

PHILIP J. POTH,
Of Counsel.

THE ARGUS PRESS, SEATTLE

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	1
Statement of the Case	1
Opinion of the Court of Appeals	7
Argument	15
A. There Has Been No Final Determination	15
B. There Is No Conflict Between Circuits on the Same Matter	15
C. There Is No Unsettled Question	17
D. Decision Not Against Weight of Authority	25
Conclusion	28

TABLE OF CASES

Boudoin v. Lykes Bros. Steamship Co., Inc., 348 U.S. 814 15

Callon v. Cone, 165 F.2d 703 20

Hildegard Schoenamsgruber v. Hamburg American Line, 294 U.S. 454, 55 S.Ct. 475, 79 L.ed. 989 15

Jarka Corp. v. Rederii, 110 F.2d 235 15

Lahde v. Soc. Armadora Del Norte, 107 F.Supp. 664, 220 F.2d 357 ..... 1, 2, 7

Lauritzen v. Larson, 345 U.S. 57, 73 S.Ct. 921 20

Luckenbach v. McCahan Sugar Co., 248 U.S. 139 16

Mahnich v. Southern S.S. Co., 321 U.S. 96 ..... 15, 16

Nolan v. General Seafood Corp., 112 F.2d 515 20

Plamals v. Pinar Del Rio, 277 U.S. 151, 48 S.Ct. 457, 71 L.ed. 827 20

Pope & Talbot v. Hawn, 246 U.S. 406 ..... 15, 16, 17, 18, 25, 27, 28

Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.ed. 1099 18

The Anaces, 93 Fed. 240 ..... 21, 26

The Ayermic, 26 F.2d 173 19

The Baymead, 88 F.2d 144 20

The Birkenhead, 51 F.2d 117 20

Page

The Buena Ventura, 117 Fed. 988 24
The Christobal Colon, 44 Fed. 803 21
The Dalhem, 41 F.Supp. 718 21
The Estrella, 2 F.Supp. 258 21
The General De Sonis, 179 Fed. 123 21
The Hamilton, 207 U.S. 398 23
The Hanly, 29 F.2d 110 20
The Havell, 273 Fed. 513 19
The Isthmian, 20 Fed. 572 21
The Job T. Wilson, 84 Fed. 204 24
The Joseph B. Thomas, 86 Fed. 658 21
The Mercier, 6 F.Supp. 511 19
The Norland, 701 F.2d 967 20
The Nyhorn, 4 F.Supp. 403 19
The S.S. Oregon, 42 Fed. 78 24
The Osceola, 189 U.S. 158, 23 S.Ct. 483, 47 L.ed. 760 ..... 19, 20
The Pacific Pine, 31 F.2d 152 21
The Ruth, 186 Fed. 87 24
The Santa Cecilia, 22 F.2d 251 19
The Steamer Max Morris, 137 U.S. 1 ..... 21, 27
The Transfer No. 12, 221 Fed. 409 24
The E. B. Ward, Jr., 23 Fed. 900 24

STATUTES

33 U.S. C.A. 901, *et seq.* 22
33 U.S. C.A. 933 22
46 U.S. C.A. 688 20

In the

Supreme Court of the United States

OCTOBER TERM, 1954

No. 821

SOC. ARMADORA DEL NORTE, a corporation, Claimant of the Steamship THEOGENNITOR, etc., *Petitioner*,

vs.

ARNE ARMUS LAHDE, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the District Court is reported at 107 F.Supp. 664. The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported at 220 F.2d 357.

JURISDICTION

The petition adequately sets forth the jurisdictional requisites.

QUESTION PRESENTED

Whether respondent's libel states a cause of action based either on negligence or unseaworthiness or both.

STATEMENT

This is a matter that arose solely on exceptions to a libel. The District Court said that the libel did not state a cause of action, 107 F.Supp. 664 (R. 55). The Circuit

Court of Appeals reversed the decree of the lower court and held that the libel properly stated a cause of action, 220 F.2d 357. A complete statement of the case is found in the libel (R. 30) and the Circuit Court's opinion regarding it, 220 F.2d 357. The second paragraph of appellant's libel to and including the 14th paragraph are as follows (R. 30-35):

> "Second. The Steamship Theogennitor is a Panamanian Steamship, and is now or during the pendency of process herein will be within the Western District of Washington, Southern Division, and within the jurisdiction of this Honorable Court.
>
> "Third. That on the 19th day of April, 1951, the libelant was employed as a longshoreman by and under the direction of the Twin Harbor Stevedoring Co., in and about the Steamship Theogennitor, then lying alongside of the pier at the Rayonier Mill in the navigable waters of the Port of Hoquiam, Grays Harbor County, State of Washington, and within the jurisdiction of this Honorable Court.
>
> "Fourth: That prior to the 19th day of April, 1951, the owners and/or operators of said vessel entered into a contract with the Twin Harbor Stevedoring Co., said Company agreeing to act, and acting at all times mentioned in this libel, as an independent contractor, having complete control and supervision of all operations pertaining to the loading and discharge of cargo from said respondent vessel, Theogennitor, in the Port of Hoquiam, in the navigable waters of Grays Harbor, at Hoquiam, Washington.
>
> "Fifth: That as an independent contractor, the

Twin Harbor Stevedoring Co. hired the libelant, Arne Armus Lahde, as a longshoreman and entered upon the performance of said contract, and the libelant, at all times herein mentioned, acted under the orders of the Twin Harbor Stevedoring Co. in its capacity as an independent contractor and employer, and not as an agent of said vessel and its said owners and operators.

"Sixth: Libelant has duly elected to sue and is entitled to sue here under Section 933 of Title 33, U.S.C.A., and amendments thereto, and libelant has notified the Commissioner of this District administering the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 901, *et seq.*, of said election.

"Seventh: That at about 8:00 o'clock in the forenoon of April 19, 1951, the libelant, in company with other longshoremen, was assigned to the No. 3 hatch of said vessel and was instructed by his said employer to ready said hatch for the loading of lumber in the hold thereof and to load said lumber therein.

"Eighth: That shortly thereafter, while in the performance of said work, and as a business guest and invitee aboard said vessel, libelant descended to the port side 'tween deck of the No. 3 hatch, by use of a ladder situate on the port side thereof, that he thereupon started, in line of duty and in performance of his duties as a longshoreman to the opposite side of the ship to assist in removing a stringer of lumber which had fallen into the lower hold of said hatch and had come to rest butt end down in said lower hold with its other end reclining against the starboard side of the 'tween deck hatch opening and extending upward and beyond the said 'tween level for a short distance.

"Ninth: That situated on the port side of the after end of the 'tween deck of the No. 3 hatch was an open door, which to all appearances connected with, and provided an easy mode of travel to a corresponding open door situated at the after part of the starboard side of said No. 3 'tween decks; that prior to the arrival of said vessel in the United States said doors had been unlocked and secured in an open position and in such position they remained at the time libelant came aboard said vessel as aforesaid, and was injured as hereinafter set forth, which situation had been effected and was known by the respondent, its owner, master and crew; that said open doors provided a passageway and invitation to travel, connecting through the 'tween decks of the cross bunker hatch situated immediately aft of the said No. 3 hatch.

"Tenth: That prior to the arrival of said vessel in the United States the crew of said vessel had created an opening at the 'tween deck level of said cross bunker hatch by removing and not replacing hatch covers and said opening continued to exist at the time libelant came aboard said vessel as aforesaid and was injured as hereinafter set forth, which situation had been effected and was known by the respondent, its owner, master and crew.

"Eleventh: That at the same time, and for a considerable time prior to the arrival of said vessel in the United States, at the weather deck level of said cross bunker hatch all strongbacks and hatch boards were in place and they were covered with a tarpaulin which was battened down; that said covering excluded overhead sources of light in the 'tween decks of said cross bunker hatch; that the emanation of light in said cross bunker hatch obtained from said open doorways; that in limited

areas about the thresholds of said doorways slanted sunlight reflected bright patterns which abruptly shaded into a hazy gloom or half light which created a convincing illusion of safe passage and effectively concealed and disguised the pitfall prepared within by the removal of hatches, as aforesaid.

"Twelfth: That libelant, while using due care and caution on his part, entered the said door on the port side of said vessel and attempted to use said passageway to the starboard side of said vessel in the course of his employment as aforesaid, and while so engaged libelant was caused to fall through said hole in the said 'tween deck cross bunker hatch and be precipitated to the bottom of said hold, as a result of which he sustained the severe and permanent injuries hereinafter set forth.

"Thirteenth: Said accident was caused, without any contributing fault or neglect on the part of the libelant, solely and proximately by the defective, unsafe, and unseaworthy condition of the vessel and its failure to provide proper and sufficient ways, works, means and appliances; by the fault and negligence of the master and crew of the said steamship and by the breach of duty owed libelant by the respondent, its owner and master in failing to provide libelant, a business invitee aboard said vessel, with a safe place in which to work and a warning of danger, in the following, among other particulars which will be pointed out on the trial of this action:

"(1) In having said doors open;

"(2) In having said opening in the cross bunker hatch uncovered;

"(3) In failing to properly illuminate the deck in the cross bunker hatch;

"(4) In failing to warn libelant of the danger then and there existing;

"(5) In failing to properly guard the said opening through which libelant fell;

"(6) In failing to make said passageway secure;

"(7) In failing to cover up said opening;

"(8) In failing to close and lock said doors in the event travel thereby was not wanted;

"(9) In inviting use of said passageway by securing said doors in an open position;

"(10) In failing to employ existing appliances of the vessel requisite to the safeguarding of said passageway;

"(11) In that said passageway was unsafe and unseaworthy because of the derangement of existing appliances of the vessel conducive to the safeguarding thereof;

"(12) In failing to take the precaution of supplying, and employing any appliance or instrumentality whatsoever sufficient to give warning of the presence of the opening through which libelant fell;

"(13) In that the respondent, its owners, agents, servants, employees, master and crew permitted said passageway to be a source of danger and menace when they anticipated, or should have anticipated that longshoremen, such as libelant, would be likely to make use of the same;

"(14) In maintaining said dangerous and undisclosed pitfall in connection with libelant's situs of employment."

Decision of the Court of Appeals

The Circuit Court's opinion (220 F.2d 357) which upheld the libel is as follows:

"Lahde appeals from a decree of the District Court dismissing without a hearing on the merits his amended libel *in rem* against the steamship THEOGENNITOR in which he, a stevedore, sought damages for injuries arising from his falling into an open hatch in an illy-lighted passageway leading to his place of work. The grounds of the dismissal are that the libel failed to allege a cause of action either based on unseaworthiness of the vessel or on negligence on the part of the officers and crew.

"A. The Libel Sufficiently States the Injuries Were Caused by the Vessel's Unseaworthiness

"The libel alleges that the stevedore came on board the vessel as an invitee to remove a stringer of timber on the starboard side of the ship, the removal a part of stevedoring the ship. To reach the stringer he would pass from an open door on the portside of the ship, enter 'tween the deck space and walk to an open door on the starboard side. The 'tween deck space was dimly lighted and nevertheless had an open hatch from which two hatchboards had been removed. This dangerous condition, the libel alleges, was known 'to the owner, master and crew.'

"In this dimly lighted area the stevedore fell through the open hatch and was injured. The libel continues with the allegation, 'Thirteenth: Said accident was caused, without any contributing fault or neglect on the part of the libelant, solely and proximately by the defective, unsafe, and *unseaworthy condition* of the vessel and its failure to provide proper and sufficient ways, works, means

and appliances;' (Emphasis supplied). The above allegations clearly state a cause of action for damages caused by the vessel's unseaworthiness. The parties agree that a libel *in rem* against the vessel may be maintained by the stevedore for injuries from such unseaworthiness.

"However, under recent decisions of the Supreme Court, we think such a cause of action is stated even though the unseaworthy condition is unknown to the owner. *Boudoin v. Lykes Bros. Steamship Co., Inc.*, No. 406, October Term 1954, was decided February 28, 1955. There, Boudoin, a seaman, recovered damages for a blow on the head from another seaman. The attacking seaman, on evidence of his conduct *after* his attack, was found to have a savage and vicious nature, so different from the ordinary seaman that his presence made the vessel unseaworthy and recovery was based on that ground. There is not the slightest evidence that the owner knew or could have known the vicious character of the attacking seaman when Boudoin was hit on the head and the cause of action arose. The district court held the vessel unseaworthy because of the attacking seaman's vicious nature and that 'the warranty of seaworthiness is a kind of liability without fault in which knowledge of the circumstances creating the unseaworthiness is immaterial.' *Boudoin v. Lykes Bros. S. S. Co.*, 112 F. Supp. 177, 180. The court of appeals reversed, holding that the 'shipowners' were not shown to have knowledge of the seaman's character.

"The Supreme Court, in reversing the court of appeals and affirming the district court, stated:

" 'We see no reason to draw a line between the ship and the gear on the one hand and the ship's personnel on the other. A seaman with a proclivity

for assaulting people may, indeed, be a more deadly risk than a rope with a weak strand or a hull with a latent defect.'

"The failure to replace the gear of the two hatch boards on the open hatch in the dim light is certainly as dangerous an unseaworthiness as the vicious nature of a crew member. Here, as in the latter case, the vessel would be liable though the unseaworthiness is unknown to the owner.

"So also in the recent case of *Pope and Talbot v. Hawn,* 346 U.S. 406. There Hawn, a carpenter invitee of the shipowner to be on the ship, as was stevedore Lahde here, was injured, as was Lahde, by falling into an open hatch. Hawn was held entitled to damages since the open hatch created unseaworthiness in the vessel. There is no mention in the opinion that the shipowner knew the hatch was open.

"The case of *Mahnich v. Southern S. S. Co.,* 321 U.S. 96, was not under the Jones Act but rested on general maritime law. The court, in holding Mahnich entitled to damages, stated:

" 'Petitioner, a seaman on respondent's vessel, the "Wichita Falls," was injured, while at sea, by a fall from a staging, which gave way when a piece of defective rope supporting it parted. The rope was supplied by the mate when there was ample sound rope available for use in rigging the staging. The question is whether the defect in the staging was a breach of the warranty of seaworthiness rendering the owner liable to indemnify the seaman for his injury.'

* * * * * * * *

" 'In thus refusing to limit, by application of the fellow servant rule, the liability of the vessel

and owner for unseaworthiness, this Court was but applying the familiar and then well established rule of *non-maritime torts,* that the employer's duty to furnish the employee with safe appliances *and a safe place to work,* is nondelegable and not qualified by the fellow servant rule. * * * It would be an anomaly if the fellow-servant rule, discredited by the Jones Act as a defense in suits for negligence, were to be resuscitated and extended to suits founded on the warranty of seaworthiness. so as to lower the standard of the owner's duty to furnish safe appliances below that of the land employer.

" 'The staging from which petitioner fell was an appliance appurtenant to the ship. It was unseaworthy in the sense that it was inadequate for the purpose for which it was ordinarily used, because of the defective rope with which it was rigged. Its inadequacy rendered it unseaworthy, whether the mate's failure to observe the defect was negligent or unavoidable. Had it been adequate, petitioner would not have been injured and his injury was the proximate and immediate consequence of the unseaworthiness. See The Osceola, *supra,* 174-175, and cases cited. Any negligence of the mate in selecting the rope and ordering its use as a part of the staging, or of the boatswain in using it for that purpose, could not relieve respondent of the duty to furnish a seaworthy staging. *Whether petitioner* (the owner) *knew of the defective condition of the rope does not appear, but in any case the seaman, in the performance of his duties, is not deemed to assume the risk of unseaworthy appliances. The Arizona v. Anelich, supra,* 123-124; *Beadle v. Spencer, supra,* 129-130; *Socony-Vacuum Co. v. Smith, supra.*' (Emphasis supplied)

"The shipowner as much owed to its invitee stevedore as to a sailor the duty to furnish 'the employee . . . a safe place to work' with 'is nondelegable' as it is not in 'non-maritime torts.'

"It is immaterial whether the shipowner, invitor of the stevedore on the ship, knew of the failure to place the ship's 'appliances,' here two hatch boards, on the open hatch dangerous in the defective lighting, since it owed the same 'nondelegable' duty to furnish him a safe place to work as does a land employer.

"B. A Stevedore May Recover *in Rem* Against the Ship to Which the Owner Invites Him for the Negligence of Its Crew Members

"This court so held in *The Joseph B. Thomas,* 86 Fed. 658 (Cir. 9), where the stevedore working in the hold was injured by a keg falling through the hatch hold above him. A sailor negligently caused the keg to fall from a pile of hatch covers on which it rested. This case is followed by our decision in *The Aymerich,* 26 F.2d 173 (Cir. 9), where we considered the merits of the contention that the charged negligence of crew members which injured a stevedore creates a right to libel *in rem* but upheld the finding of the lower court that there was no negligence. We held similarly in *The Santa Cecilia,* 22 F.2d 251 (Cir. 9), where recovery *in rem* was denied because no negligence was shown.

"Likewise in the *Max Morris,* 137 U.S. 1, the longshoremen recovered *in rem* for injuries resulting from the ship's officers' negligence. So also in *Brady v. Roosevelt S. S. Co.,* 317 U.S. 531, where a widow recovered *in rem* for the death of her husband caused by negligence, he being an invitee on the vessel. So also in *The Helios,* 12 Fed. 732 (D.C.,

S.D., N.Y.); *Gerrity v. Bark Kate Conn,* 2 Fed. 241 (D.C., E.D., N.Y.).

"We have also held that the stevedore may recover in admiralty *in personam* for the negligence of the crew. *Tidewater Associated Oil Co. v. Richardson,* 169 F.2d 802 (Cir. 9); *Grays Harbor Stevedore Co. v. Fountain,* 5 F.2d 385 (Cir. 9).

"Appellant contends that all these cases are against the law as it is today. Now, it contends, the stevedore's status must be deemed identical with that of a seaman in his relationship with the owner and the vessel. It relies on *International Stevedore Co. v. Haverty,* 272 U.S. 50, involving the Act of June 5, 1920, 41 Stats. 988, 1007, giving seamen the same right to sue the employer as is given railway employees. In holding that a stevedore working on a vessel was entitled to the same right the court states:

" 'It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen.' But words are flexible. The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew. *Atlantic Transport Co. v. Imbrovek,* 234 U.S. 52, 62. We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship. The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business. If they should be protected in the one case they should be in the other. In view of the broad field in which Congress has disapproved and changed the rule introduced into the common law within less

than a century, we are of the opinion that a wider scope should be given to the words of the act, and that in this statute "seamen" is to be taken to include stevedores employed in maritime work on navigable waters as the plaintiff was, whatever it might mean in laws of a different kind.'

"Ignoring the words 'It is true that for most purposes, as the word is commonly used, stevedores are not seamen' appellee contends that stevedores for *all* purposes are seamen and, since it is unquestioned that seamen in the absence of statute cannot recover for negligence of fellow crew members, the stevedore cannot.

"Appellee also relies on language in *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, holding that for the 'purpose' of the liability there claimed the stevedore's rights are the same as a seaman's, the court stating at page 99:

"' * * * * for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protection, regardless of the fact that he is employed immediately by another than the owner. *For these purposes* he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards.' *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 99.' (Emphasis supplied)

"The 'purpose' of the *Sieracki* case was the determination of the stevedore's right to recover in a civil action at law for an injury due to the vessel's unseaworthiness. As to this the holding is that the stevedore is identical with the seaman. From this, the reasoning of appellee again jumps to the conclusion that for *all purposes* the rights of the stevedore are the same as those of the seaman and since

the seaman has no right to recover for the negligence of the officers and crew, either *in rem* or *in personam,* the stevedore has no such right.

"The Supreme Court holds to the contrary in *Pope and Talbot v. Hawn,* 346 U.S. 406. That is a case at common law in which Hawn, aboard the ship as a carpenter employed by a firm engaged to repair it, sued the shipowner for injuries arising from the negligence of the shipowner. The court held that the shipowner's liability was that of the admiralty law. It disposes of appellee's contention concerning the case of *Seas Shipping Co. v. Sieracki,* adversely to appellee, stating at page 413: 'The fact that Sieracki upheld the right of workers like Hawn to recover for unseaworthiness does not justify an argument that the court thereby blotted out their long-recognized right to recover in admiralty for negligence.'

"The 'long recognized right' of the stevedore is to recover both *in personam* and *in rem* for such negligence. We hold that our decision in the case of the *Joseph B. Thomas* states the law as it is today and that stevedore Lahde's libel properly alleges his claim that he is entitled to recover *in rem* from the steamship THEOGENNITOR for his injuries arising from the negligence of members of its crew.

"The decree is reversed."

ARGUMENT

A. There Has Been No Final Decision

The decree below merely determines that the libel states a good cause of action. It does not determine the rights and liabilities of the parties. Such can only be determined after a trial on the merits.

> *Hildegard Schoenamsgruber v. Hamburg American Line,* 294 U.S. 454, 55 S.Ct. 475, 79 L.ed. 989;
>
> *Jarka Corp. v. Rederii,* 110 F.2d 235.

B. There Is No Conflict Between Circuits on the Same Matter

Respondent's libel (R. 30) alleges both unseaworthiness and negligence. Petitioner contends that the decision of the Ninth Circuit Court in this case conflicts with decisions on the subject of unseaworthiness in other circuits. Petitioner, in making this assertion, has overlooked the fact that the Ninth Circuit of Appeals, in construing respondent's libel, relied entirely on cases decided by the Supreme Court of the United States.

> *Boudoin v. Lykes Bros. Steamship Co., Inc.,* 348 U.S. 814;
>
> *Pope & Talbot v. Hawn,* 346 U.S. 406;
>
> *Mahnich v. So. S. S. Co.,* 321 U.S. 96.

Petitioner has further overlooked the fact that Respondent Lahde was injured by a means identical with that which injured Hawn in the case of *Pope & Talbot v. Hawn, supra.* Hawn was injured "when he slipped and fell through an uncovered hatch hole on the peti-

tioner Pope & Talbot's vessel." Lahde likewise alleges that he fell through an uncovered hatch hole. In the *Hawn* case (*supra*), the Supreme Court of the United States found that condition to constitute unseaworthiness. No conflict can be said to exist either with the Supreme Court of the United States or with any other circuit, when the Ninth Circuit Court said in the present case as follows:

> "So also in the recent case of *Pope & Talbot v. Hawn*, 346 U.S. 406. There Hawn, a carpenter invitee of the shipowner to be on the ship, as was stevedore Lahde here, was injured, as was Lahde, by falling into an open hatch. Hawn was held entitled to damages since the open hatch created unseaworthiness in the vessel. There is no mention in the opinion that the shipowner knew the hatch was open."

However, the present case is yet to be tried on its facts. The libel sufficiently alleges unseaworthiness for the ordinary purposes of pleading. A finding of unseaworthiness is a finding of fact to be determined by the trier of the facts.

> *Luckenbach v. McCahan Sugar Co.*, 248 U.S. 139;
>
> *Mahnich v. Southern S. S. Co.*, 321 U.S. 96.

The actual fact of whether or not unseaworthiness existed and was one of the causes of respondent's injuries awaits a trial on the merits. This case being at the present only at the pleading stage, respondent's libel must in any event be broadly construed because, as was said in the *Hawn* case,

> "Since unseaworthiness affords longshoremen

recovery without fault and has been broadly construed by the courts, *Mahnich v. Southern Steamship Company, No. 2,* it will be rare that the circumstances of an injury will constitute negligence, but not unseaworthiness."

C. There Is No Unsettled Question

In fact, the very question which petitioner now infers is unsettled has been conclusively determined and settled by plain and unmistakable language in the case of *Pope & Talbot, Inc., v. Hawn,* 346 U.S. 406. The court's opinion in the *Hawn* case found at 346 U.S. 413, conclusively shows that a longshoreman has a libel *in rem* for negligence.

"A concurring opinion here raises a question concerning the right of Hawn to recover for negligence—a question neither presented nor urged by Pope & Talbot. It argues that the *Sieracki* case, by sustaining the right of persons like Hawn to sue for unseaworthiness, placed them in the category of 'seamen,' who cannot under the *Osceola,* 189 U.S. 158, maintain a negligence action against the shipowner. The *Osceola* held that a crew member employed by the ship could not recover from his employer for negligence of the master or the crew member's 'fellow servants.' Recoveries of crew members were limited to actions for unseaworthiness and maintenance and cure. But Hawn was not a crew member. He was not employed by the ship. The ship's crew were not his fellow servants. Having no contract of employment with the shipowner, he was not entitled to maintenance and cure. The fact that *Sieracki* upheld the right of workers like Hawn to recover for unseaworthiness does not justify an argument that the court thereby blotted out

their long recognized right to recover in admiralty for negligence."

The note by the Supreme Court commencing at the bottom of the page at 346 U.S. 413, is as follows:

"Illustrative of the unbroken line of federal cases holding that persons working on ships for independent contractors or persons rightfully transacting business on ships can recover for damages due to shipowner's negligence are: *Leathers v. Blessing,* 105 U.S. 626 (1882); *The Max Morris,* 137 U.S. 1 (1890); *Gerrity v. The Bark Kate Cann,* 2 Fed. 241 (1880); *The Helios,* 12 Fed. 732 (1882), decision by Judge Addison Brown; *Grays Harbor Stevedore Co. v. Fountain,* 5 F.2d 385 (1925); *Tide Water Assoc. Oil Co. v. Richardson,* 169 F.2d 802 (1948); *Brady v. Roosevelt S.S. Co.,* 317 U.S. 575, 577 (1943). See also cases collected in 44 A.L.R. 1925-1934."

A play on the term "seaman" does not in any way becloud the clearness of a stevedore's status aboard a vessel. Negligence alone has been the exclusive ground for recovery on the part of a longshoreman until he was given an added remedy for unseaworthiness by *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 90 L.ed. 1099, 66 Sup. Ct. 872. Prior to the *Sieracki* case, a longshoreman could not recover for a defective condition aboard a vessel, which in itself constituted unseaworthiness, unless it was proved that those charged with the vessel's management knew of the defect or by the exercise of reasonable care could have discovered it. Mere proof of unseaworthiness was not enough. He had to show further that there was negligence either in failing to dis-

cover the defect, remedy it or protect the longshoremen from it after a fair opportunity to do so.

The Ayermic, 26 F.2d 173;
The Mercier, 6 F.Supp. 511;
The Santa Cecelia, 22 F.2d 251;
The Nyhorn, 4 F.Supp. 403.

If he failed in his proof of negligence, the fact that the condition that caused his injuries was due to an unseaworthy condition was of no avail.

In playing on the term "seaman," petitioner has neglected to pay heed to the plain language of the *Hawn* decision which placed invitees doing "seaman's" work aboard a vessel in a different category than members of the crew, in so far as the bar of *The Osceola* case (189 U.S. 158, 23 S.Ct. 483, 47 L.ed. 760) operated to preclude suits for negligence because of the fellow servant rule. The decision in *The Osceola* case, *supra,* denied to crew members the right to recover for negligence because they were deemed to be between themselves fellow servants. The court in *The Osceola* case engrafted into the general maritime law the common law fellow servant rule. However, the fellow servant rule has no application to invitees aboard the vessel, such as longshoremen. The principle restated in the *Hawn* case is not a new one, but is merely a reaffirmation of a long settled proposition enunciated in a long line of cases, among which is *The Howell,* 273 Fed. 513, a case wherein a longshoreman sought recovery *in rem* against the ship for injuries caused by the negligence of the master. Here the court said:

"Libelant not being a member of the crew, no

question of seaman's right or contracts arises, under *The Osceola*, 189 U.S. 158, 23 S.Ct. 483, 47 L.ed. 760. He must recover on principles of negligence."

Petitioner doubtless has been led astray by the fact that crew members under *The Osceola* case, *supra*, had no remedy at all for negligence under the general maritime law because of the common law fellow-servant rule. Their right to recover for negligence was given to them in 1920 by statute. The Jones Act, 46 U.S.C.A. 688, gave only an *in personam* right of action against the employer.

Plamals v. Pinar Del Rio, 277 U.S. 151, 48 S.Ct. 457, 71 L.ed. 827.

Here, then, is the source of petitioner's confusion. Petitioner, finding that a seaman suing under the Jones Act has by statute only an *in personam* remedy against his employer, thinks that longshoremen likewise have only an *in personam* remedy. But petitioner has overlooked the fact that respondent is not suing under the Jones Act. He could not here do so because he is maintaining an action against a person other than his employer. The employer-employee relationship must exist at the time of injury in order for the Jones Act to apply.

Callon v. Cope, 165 F.2d 703;

Nolan v. General Seafood Corp., 112 F.2d 515;

The Norland, 101 F.2d 967;

The Baymead, 88 F.2d 144;

The Birkenhead, 51 F.2d 117;

The Hanly, 29 F.2d 110;

Lauritzen v. Larson, 345 U.S. 57, 73 S.Ct. 921.

The respondent, since the Jones Act does not apply to him, sues under the general maritime law. The brand of negligence and the limitations on recovering for it as contained in the Jones Act have no application to him. A longshoreman in his status as a business guest and invitee aboard a vessel traditionally has had a right to recover *in rem* for the negligence of those charged with the vessel's management.

The Pacific Pine, 31 F.2d 152;
The Steamer Max Morris, 137 U.S. 1;
The Joseph B. Thomas, 86 Fed. 658;
The General De Sonis, 179 Fed. 123;
The Christobal Colon, 44 Fed. 803;
The Isthmian, 20 Fed. 572;
The Estrella, 2 F.Supp. 258;
The Dalhem, 41 F.Supp. 718;
The Anaces, 93 Fed. 240.

Petitioner complains that crew members when they sue for negligence under the Jones Act can only sue their employer if they wish the benefit of that Act. Congress did not see fit to give them an *in rem* action against the vessel to which they are attached by their contract of employment. However, when crew members sue persons other than their employer in a proper case of marine tort giving rise to a maritime lien, they stand on equal terms with longshoremen. It is without question that in such instances both sue a third party under the general maritime law for marine torts which give rise to a lien in proper circumstances.

Petitioner speaks of inequitable inequality in allow-

ing longshoremen to sue *in rem* when crew members cannot. It is inferred that the courts have brought about this inequity. Disregarded by petitioner is the plain fact that this situation, which is in no way inequitable, has been created by Congress. Crew members have a right to libel a vessel *in rem* for unseaworthiness, but Congress in giving them a remedy for negligence provided in the Jones Act that they could only enforce their remedy for negligence *in personam*. Congress, by the Longshoremen's & Harbor Workers' Act, 33 U.S. C.A. 901, *et seq.*, deprived longshoremen of their pre-existing right to sue their employers, preserving, however, their right to sue third parties such as respondent has done in this cause under Section 933 of said Act.

In summing up the rights and remedies of the two groups, it is to be seen that longshoremen are perhaps the least favored of the two groups. Crew members can sue the vessel on which they are employed *in rem* for unseaworthiness and their employers for negligence under the Jones Act, with the particularly favorable rules contained therein by an *in personam* action. They can sue third parties either *in rem* or *in personam*, and they are entitled to receive during sickness and disability their cure and maintenance at the stipulated rate of $56 per week.

Longshoremen are deprived of any action at all against their employers, either for negligence or unseaworthiness. They have a right to receive compensation at the maximum rate of $35 per week for accidental injuries received in the course of their employment. They have the same rights as seamen against third parties to

recover for marine torts. When petitioner complains that crew members cannot libel a vessel *in rem* for negligence under the Jones Act, it is complaining about an Act from whose benefits longshoremen have been completely excluded by an Act of Congress. If crew members and longshoremen were both covered by the same Jones Act, but were differently treated by the courts in the application of that Act, then there would be cause for complaint, but such is not the case.

Petitioner has further overlooked the fact that crew members today have broader rights to recover *in rem* than longshoremen. Petitioner has also neglected to see that a longshoreman's suit for negligence can only be against a third party, and that when crew members and longshoremen sue third parties, they stand on equal footing. When crew members sue an offending vessel for negligence in a third party action, as the respondent has done in this cause, they, too, have a maritime lien enforcible in an *in rem* proceeding. A case in point is *The Hamilton,* 207 U.S. 398. Here, certain members of the crew of The Saginaw were killed in a collision caused by the negligence of The Hamilton. The court said:

> "The main objection is that the statute (Delaware Wrongful Death Act) allows a recovery beyond maintenance and support which were declared in *The Osceola,* 189 U.S. 158, 175, to be the limit of a seaman's rights against his owner's vessel when injured by the negligence of the master or a fellow-servant on his ship. But the question here regards the liability of the Hamilton, another vessel. The contract between the seamen and the owners of the Saginaw does not affect the case."

Also, in a similar case, *The S. S. Oregon,* 42 Fed. 78, it was said:

> "A person injured by a marine tort—a tort committed on a navigable river of the United States—has a lien upon the offending vessel for the damages he is entitled to recover. *The Rock Island Bridge,* 6 Wall. 215; *The Avon,* 1 Brown Adm. 170."

Another case in point is *The Transfer No. 12,* 221 Fed. 409. Here, crew member Lavin of the Ticeline was injured by a collision with The Transfer No. 12. He sued the latter vessel *in rem* and the court said:

> "If Lavin's injuries were caused by negligence of the No. 12, he had a right *in rem;* that is, he had a property in the vessel which dated, not from the time she was attached, nor from the time when his claim was judicially established upon the merits or finally determined as to amount, but from the time the cause of action arose. That is the nature of a maritime lien."

Other cases which similarly hold that a crew member can sue a third party vessel *in rem* in actions identical to that of the respondent in this cause are as follows:

The Ruth, 186 Fed. 87;

The E. B. Ward, Jr., 23 Fed. 900;

The Buena Ventura, 117 Fed. 988;

The Job T. Wilson, 84 Fed. 204.

The respective causes of action of crew members and longshoremen for injuries occasioned by marine torts are as follows:

Crew Members	*Longshoremen*
In rem action against employers' vessel for unseaworthiness.	No action against employer's vessel.
In personam action against employer for negligence and unseaworthiness.	No action against employer.
In personam or in rem action against third parties.	In personam or in rem action against third parties.

The above propositions are well settled. No one of them is anywhere found to be the subject of any conflict.

D. Decision Not Against Weight of Authority

The decision of the Circuit Court cannot be said to conflict with the weight of authority because petitioner has cited no authority that conflicts with it. The plain fact of the matter is that all authorities agree that a longshoreman may libel a vessel *in rem* for negligence.

Petitioners indicate that the *Hawn* case should not be considered because it was an action *in personam*. Overlooked again, it is, that both crew members and longshoremen, when they sue third parties for negligence in cases of marine tort, can elect to proceed either *in rem* or *in personam*. The fact that Hawn brought an *in personam* action instead of an *in rem* action is unimportant. The Hawn case is important because it confirms the continued right of a stevedore to recover for negligence. The form of enforcing the right is merely a matter of choice on the part of the suitor.

The reported cases are unanimous in holding that a

longshoreman has a right to proceed *in rem* against a vessel, as well as *in personam* against her owner for injuries caused by negligence.

Justice requires that a longshoreman be allowed to keep the *in rem* form of enforcing his remedy. In many instances, as in the case of foreign vessels such as *The Theogennitor* in this cause, he would otherwise have no remedy at all. This was plainly stated in *The Anaces, supra,* where the court discussed this very matter in reference to longshoremen:

> "Every consideration of justice and convenience urges that the maritime lien, if it exists, should be maintained in cases like the present one. The owners of the vessel almost invariably are unknown and inaccessible. To require libelants to serve process on them is practically to deny them any remedy."

A crew member when he signs articles aboard a vessel is fully acquainted with the identity of her ownership. So it is that Congress found it unnecessary to provide him with an *in rem* remedy under the Jones Act because adequate protection was afforded him by a proceeding *in personam*. The contrary is true with respect to a longshoreman. Foreign vessels are wont to come and go at the whim of their owners and charterers, who often are inaccessible by reason of their residence in far away lands. Their identities cannot be readily ascertained. If a longshoreman cannot attach the *res* while it is within the jurisdiction of the court, his remedy is lost forever.

Petitioner infers that the Ninth Circuit strayed into

error when it relied on *The Max Morris,* 137 U.S. 1. The Supreme Court here held that a longshoreman may recover for negligence *in rem.* Here, the court said:

> "We think this rule is applicable to all like cases of marine tort, founded upon negligence and prosecuted in admiralty."

Petitioner has overlooked the fact that the Circuit Court followed the Supreme Court of the United States in its decision in the *Hawn* case. It actually was the Supreme Court of the United States which cited, with approval and relied upon *The Max Morris* in its finding in the *Hawn* case that longshoremen had a remedy under the general maritime law for negligence which was enforceable *in rem.*

It is not now a matter of weight of authority. Nowhere is it contradicted that a longshoreman may sue *in rem* for either unseaworthiness or negligence, or both.

In the instant case, it is unimportant whether or not the circumstances of respondents' injury constitutes negligence but not unseaworthiness. If he proves the negligence, he still has his recovery, regardless of the finding with respect to unseaworthiness. The petitioner does not deny that the libel sufficiently alleges negligence. The *Hawn* case in this respect is authority also for the proposition that a dangerous situation created by negligence will almost always constitute unseaworthiness, except in rare circumstances. Respondent's libel obviously does not present one of those rare cases. In admitting that respondent's libel has properly charged negligence, petitioner has, perhaps, under the

analysis of Mr. Justice Frankfurter in the *Hawn* case, also admitted the very unseaworthiness which petitioner denies. All these matters, however, can only be determined by a trial on the merits.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for Writ of Certiorari be denied.

Respectfully submitted,

OSCAR A. ZABEL,
Proctor for Respondent,
518 Fourth & Pike Building,
Seattle 1, Washington.

PHILIP J. POTH,
Of Counsel.